Introduction to Alternative Dispute Resolution

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DISPUTE RESOLUTION SERVICE
Federal Energy Regulatory Commission

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Outline

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Alternative Dispute Resolution (***ADR***) is a broad term that encompasses all forms of dispute resolution, other than court-based adjudication, that use neutral third parties to help disputants resolve conflicts. This presentation identifies the most common forms of ADR (as well as traditional adjudication processes).

This guide also provides a primer on interest-based negotiation for participants in a facilitated process. It highlights the key elements of effective negotiation: (1) using good communication skills; (2) identifying the interests underlying positions; and (3) developing options, and ultimately solutions that address the expressed interests. Finally, the guide provides a brief summary regarding the role of a mediator during a collaborative process, and the skills that are needed by participants who facilitate team meetings.

I. The Continuum of Dispute Resolution Approaches

There are several methods that may be used to resolve disputes. These methods range from the most common – unassisted negotiation – to the most formal – court adjudication. Between these two extremes are a variety of "alternative" processes that may be better suited to a particular situation.

To better understand where ADR fits in the continuum of dispute resolution techniques, the following chart illustrates the various dispute resolution methods, each of which is described in detail in the text below.

RESOLVING DISPUTES CONTINUUM

Unassisted Negotiation
Alternative Dispute Resolution (Assisted Negotiation) ***Non-evaluative*** → → → → → → → → ***Evaluative*** **Conciliation** **Facilitation** **Mediation** **Settlement Judge Process** **Early Neutral Evaluation** **Mini-trial** **Fact-finding** **Non-binding arbitration**
Adjudication **Court** **Administrative** **Binding Arbitration**

A. Unassisted negotiation

What is it and when is it used? In many respects, negotiation is the fundamental form of dispute resolution. Negotiation is a process of discussion and give-and-take between two or more bargainers/disputants who seek to find a solution to a common problem. It has been described as a bartering and communication process and a psychological confrontation.

How is it done? The bargaining can be a relatively cooperative process when both sides seek a solution that is mutually beneficial (a win-win solution or cooperative bargaining). It can also be confrontational when each side seeks to prevail over the other (win-lose or adversarial). The definition of the negotiation process, and how the process occurs differ across cultures.

B. Alternative Dispute Resolution (Assisted Negotiation)

As noted in the Continuum above, assisted negotiation methods can be more or less evaluative, depending not only on the method chosen but also the needs of the participants and the neutral chosen. Generally, the least evaluative of the assisted negotiation processes are conciliation and facilitation, somewhat evaluative processes may be mediation and the Commission's Settlement Judge process, even more evaluative processes are the mini-trial and early neutral evaluation, and the most evaluative process is non-arbitration. However, these distinctions can blur in a particular process.

1. Conciliation

What is it? Conciliation involves building a positive relationship between the parties to a dispute. A third party or conciliator (who

may not be totally neutral to the interests of the parties) may be used by the parties to help build such relationships.

How is it done? A conciliator may assist parties by helping to establish communication, clarifying mis-perceptions, dealing with strong emotions, and building the trust necessary for cooperative problem-solving. Conciliators may: provide for a neutral meeting place, carry initial messages between/among the parties, provide reality testing regarding perceptions or mis-perceptions, and affirm the parties' abilities to work together.

When is it used? Because a general objective of conciliation is often to promote openness by the parties (to take the risk to begin negotiations), this method allows parties to begin dialogues, get to know each other better, build positive perceptions, and enhance trust.

The conciliation method is often used in conjunction with other methods such as facilitation or mediation.

2. Facilitation

What is it? Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to a decision-making meetings where a specific outcome is desired (*e.g.*, resolution of a conflict or dispute).

The term "facilitator" is often used interchangeably with the term "mediator," but a facilitator does not typically become as involved in the substantive issues as does a mediator. The facilitator focuses more on the process involved in resolving a matter.

How is it done? The facilitator generally works with all of the participants at once and provides procedural directions for the

group to move efficiently through the problem-solving steps of the meeting and arrive at the jointly agreed-upon goal. The facilitator may be a member of one of the parties to the dispute or may be an external consultant. Facilitators focus on procedural assistance and may remain impartial to the topics or issues under discussion.

When it it used? Use of facilitation is most appropriate when:

a. the intensity of the parties' emotions about the issues inhibits good communication;
b. the parties or issues are not extremely polarized;
c. the parties have enough trust in each other that they can work together to develop a mutually-acceptable solution; or
d. the parties are in a common predicament and they need or will benefit from a jointly-acceptable outcome.

Generally, in FERC-related disputes, facilitators may be representatives from the Dispute Resolution Service (DRS) or another office.

3. Mediation

What is it? Mediation is the intervention into a dispute or negotiation of an acceptable, impartial and neutral third party who has no decision-making authority. The objective of the third-party neutral is to assist the parties in voluntarily reaching an acceptable resolution of the issues in dispute. The mediation process is voluntary and does not eliminate other dispute resolution options. Also, a mediation process is confidential, whether or not it results in settlement.

The third-party neutral in FERC mediation can include a mediator from the private sector, a Commission administrative law judge, or a mediator from the Commission's Dispute Resolution Service (DRS) or another office.

How is it done? A mediator, like a facilitator, makes procedural suggestions regarding how parties can reach agreement. A mediator may also suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator can work with the parties individually in caucuses, or with all parties present, to develop interests and explore options that address their interests.

Mediators differ in their degree of directiveness. Many mediators focus on business relationships in the process of dispute resolution. Such relationships will often continue in the future and creative solutions may reduce or eliminate tension so that constructive and improved relationships develop. The key is that the parties work with the mediator to develop a process that meets their needs, and determine what role they want the mediator to play.

When is it used? Professional mediators are trained in developing ways to involve key stakeholders to the dispute. A skilled mediator should be able to work in dual-party to multi-party contexts in which the mediator has to be both an excellent facilitator and an organizational manager. In the multi-party context, the parties need a neutral who can assist a diverse group of interested parties in solving a complex set of issues in an organized way.

4. Settlement Judge Process

What is it? Settlement judge proceedings at the Commission are conducted under Rule 603 of the Commission's regulations. The Commission's settlement judges are administrative law judges who are trained in alternative dispute resolution techniques and are authorized to consult with the parties and assist them in resolving a dispute.

How is it done? Settlement judge proceedings require the participation of the parties, and the judge controls the process. The settlement judge will convene and preside over conferences and settlement negotiations between the participants and assess the practicalities of a potential settlement.

A settlement judge can employ any one of the many alternative dispute resolution applications, but generally uses a mediation-type approach. However, the judge is typically evaluative when addressing the issues. To encourage a free flow of information, the settlement judge is prohibited from discussing the case with a decision-maker or the advisory staff.

When is it used? The parties or the presiding judge assigned to a hearing may request, or the Commission may direct, the appointment of a settlement judge. Participants may request that the Chief Judge assign a particular settlement judge to a proceeding. If available, that individual will be designated as the settlement judge.

5. Early neutral evaluation

What is it? Early neutral evaluation (ENE) aims to provide parties in dispute with an early and frank evaluation by an objective observer or "evaluator" of the merits of a case. It is used when the parties disagree significantly about the value of their cases and are locked in positional bargaining. In positional bargaining, parties focus on the value or merit of their positions in which the resolution is based on who has the better position, as opposed to interest-based negotiation in which parties attempt to meet each others' interests.

Like mediation, the ENE process is voluntary and does not eliminate other dispute resolution options. Also, the ENE process, whether or not it results in settlement, is confidential. Finally, the

evaluator is neutral -- *i.e.*, not a decision-maker, litigator, or investigator.

How is it done? During ENE, the objective Evaluator studies materials provided by the parties, performs independent research into relevant case law as necessary, considers presentations (written and/or oral), and clarifies positions and facts through questions. The depth of analysis, subject matter expertise and comprehensive legal evaluation provided by the Evaluator can vary according to the experience, time and effort that the Evaluator can offer the parties. In addition, the process need not be confined to the arguments raised by the parties. After gathering all the information needed, the Evaluator then offers an opinion as to the settlement value and the potential outcome of the case, including what the Commission staff may recommend. The evaluation made is not binding.

These factors set ENE apart from other evaluative ADR methods, such as arbitration, and may make it useful in a variety of situations in which the parties need objective expertise. Moreover, while settlement is not the main goal of ENE, the parties may alter their negotiation approaches or explore other options for settlement.

When is it used? ENE is particularly appropriate when the dispute involves technical or factual issues that lend themselves to expert evaluation, and when the top decision-makers of one or more of the parties could be better informed about the real strengths and weaknesses of their cases. ENE can enhance direct communication between the parties about their claims and supporting evidence and provide an assessment of the merits of the case by a neutral expert. In addition, it can provide a "reality check" for clients and lawyers and help to identify and clarify the central issues in dispute.

6. Mini-trial

There are actually two types of mini-trial: the "Executive mini-trial" and the "Judicial mini-trial."

What is an Executive Mini-trial? An Executive mini-trial is actually not a trial. Instead, it involves a structured settlement process in which each side to a dispute presents abbreviated summaries of its cases to the major decision-makers for the parties who have authority to settle the dispute. The summaries contain explicit data about the legal basis and the merits of a case.

> ***How is it done?*** The process generally follows more relaxed rules of discovery and case presentation than might be found in a court or other formal proceeding and usually the parties agree on specific limited periods of time for presentations and arguments.
>
> A third party neutral may oversee a mini-trial. That individual is responsible for explaining and maintaining an orderly process of case presentations and may give an advisory opinion regarding a settlement range, if requested, rather than offer a specific solution for the parties to consider. The third party may also provide mediation services upon request.
>
> ***When is it used?*** The rationale behind an executive mini-trial is that if the decision-makers are fully informed as to the merits of their cases and that of the opposing parties, they will be better prepared to successfully engage in settlement discussions.

What is a Judicial Mini-trial? A Judicial mini-trial is an abbreviated hearing that involves attorneys for all of the parties to the litigation.

How is it done? Attorneys put on their clients' experts for a quick decision on the preliminary issue, by a Judge picked for that particular purpose. At the conclusion of the mini-trial, the judge renders a non-binding opinion. If the parties are unable to conclude a settlement, the case will proceed to trial in the normal manner.

When is it used? The Judicial mini-trial can be helpful when the parties are unwilling to negotiate on the full range of issues because they are "stuck" on a preliminary issue that both sides think they can win. The mini-trial on preliminary issues may be effective to break the logjam.

7. Fact-finding

What is it? Fact-finding is a process of determining the relevant facts relevant to a controversy.

How is it done and when is it used? Fact-finding can be performed by a neutral third party who is selected by the parties in advance to make either conclusive or advisory decisions. The parties may also select expert fact-finders, who are neutrals who give expert opinions that are either conclusive or non-binding on technical, scientific or legal questions. Advisory staff's use of technical conferences is comparable to an ADR fact-finding process.

8. Non-binding arbitration

What is it and how is it done? In non-binding arbitration, parties or their representatives present a dispute to an impartial or neutral individual for issuance of an advisory or non-binding decision (*i.e.,* the parties do not have to accept the opinion). Under the process, the parties have input into the

selection process, which gives them the ability to choose an individual or panel with some expertise and knowledge of the disputed issues.

When is it used? Non-binding arbitration is appropriate when the dispute includes some or all of the following characteristics:

a. the parties are looking for a quick resolution to the dispute;

b. the parties prefer a third party decision-maker, but want to have a role in selecting the decision-maker; and

c. the parties would like more control over the decision-making process than might be possible with more formal adjudication of the dispute.

C. Adjudication

1. Court

What is it and how is it done? Court adjudication is a formal dispute resolution process in which parties present evidence to a judge or a jury who decides the outcome of the controversy. Formal rules dictate the presentation of evidence, and the decision may typically be appealed to higher panel or court.

When is it used? Formal adjudication is what many in our culture believe is the only or best way to settle a dispute. In fact, it is appropriate when:

a. there are legal or policy reasons for uniform treatment of the issues.

b. Outcomes of an ADR process would affect non-participants (all affected participants must be represented).

c. One or more key parties is not committed to an ADR process.

d. It is important that there be a full record of the proceeding.

2. Administrative

What is it? An administrative hearing is a formal proceeding at an agency that orders a trial-type hearing to decide facts in dispute between parties. An administrative law judge at that agency oversees the hearing process and is responsible for conducting proceedings, interpreting the law, applying agency regulations, and carrying out the policies of the agency in the course of the adjudications. Although the judge is an employee of the agency, the judge's appointment is absolute to ensure an independent exercise of these functions.

How is it done? During the administrative hearing, the administrative law judge will hear evidence (which is generally subject to formal rules) and make recommendations to the agency heads as to as to how the agency should proceed. The agency may follow, amend, or reject the judge's findings. The decision of the agency, once final, typically may be appealed to an appropriate court.

When is it used? A hearing is appropriate in the following situations:

a. The dispute would/should establish a Commission precedent or define broad Commission policy.
b. The Commission needs to apply uniform treatment that cannot be achieved through using ADR.
c. Party/Commission demonstrates a strong needs to maintain status quo.
d. It is important that there be a full record of the proceeding.
e. Outcomes of an ADR process would affect non-participants (all affected participants must be represented).
f. One or more key parties is not committed to an ADR process.

3. Binding Arbitration

What is it and how is it done? In binding arbitration, a party or representative presents a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of a binding (non-appealable) decision. Unless arranged otherwise, the parties usually have the ability to decide which individuals will serve as arbitrators. In some cases, the parties may retain a particular arbitrator (often from a list of arbitrators) to decide a number of cases or to serve the parties for a specified length of times. Parties are typically free to negotiate the terms and conditions under which arbitrators are used to resolve disputes, including the procedures for their selection.

When is it used? Binding arbitration is most appropriate when the parties want a third party to decide the outcome of their dispute for them but would like to avoid the formality, time, and expense of a trial. The parties do not retain control over how their dispute is resolved, and generally cannot appeal the arbitrator's award.

II. Negotiation Models

A. Positional Bargaining vs. Interest-Based Negotiations

1. Positional Bargaining

Positions are framed by legal precedent and policy. The focus is on ***solutions*** that meet the negotiator's expectation based on legal precedent, facts and policy.

- Opening position represents the maximum desired gain
- Subsequent positions make fewer demands against the opponent and result in lesser gains to the advocate
- The negotiators reach agreement when their positions draw closer together and they can reach a compromise

2. Interest-Based Negotiation

Interests are what people find **really important**, worry about, want to protect, fear, hope for, and desire. They are more powerful than positions because they involve values, principles and emotions. The focus is on satisfying as many of the ***needs*** of the negotiators as possible.

- It is a problem-solving process to find broad-based solutions rather than a win/lose proposition
- Aims toward consensus rather than compromise

Major Distinctions Between Positions and Interests

Positions are ***what*** a party feels/believes/wants ➜ The party's ***own solutions*** to an issue	Interests are ***why*** a party feels/believes/wants a certain thing ➜ What's ***important*** about the issue

B. Components of Interest-Based Negotiation

1. Effective communication

Good communication skills are essential for good negotiation. These include the ability to hear, to understand, and to speak persuasively and convincingly. Good communication skills include:

*Active listening -- giving the speaker your full attention. This includes asking questions, and reframing ("looping") the speaker's statements to understand what is being said. It also includes body language to show interest and understanding.

*Speaking clearly, efficiently and respectfully -- so you convey information effectively and persuade others of your interests.

2. What are yours and others' underlying interests?

What do you **really want and need**? What do other negotiators really want and need? Learn and share these to understand what is really at stake.

3. What are yours and others' alternatives?

An alternative is what will happen if there is no agreement between/among the parties. *I.e.*, what is the bottom line?

Alternatives include:

* the best alternative to a negotiated agreement (yours and others), and

* the worst alternative to a negotiated agreement (yours and others).

4. Options -- Creating and Evaluating

Options are all of the possible elements on which negotiators might agree to address the problem(s). Coming up with mutually-acceptable options is a creative process. It is also consensus-building process: the best **options satisfy all of the important interests** identified by the negotiators.

5. Legitimacy -- objective criteria

The best agreements are based on a fair and appropriate standard upon which everyone can agree. Legitimacy is based in principle, not pressure or force. However, it is appropriate to **question the basis** for an action or a demand before accepting it as fair.

6. Relationships

Relationships are the interactions that the negotiators and other third parties have had in the past, have now, and expect to have in the future. The keys to the success of a relationship are the levels of trust and respect that the parties have for each other.

7. Commitment

Commitments are agreements to what the negotiators will/won't do. The best agreements are backed by the resolution of the negotiators to support **mutually-agreeable, well-reasoned, clear, fair, realistic and enforceable** terms.

C. Barriers to Negotiation

There are a number of reasons that negotiations do not work that may have nothing to do with the facts in dispute. However these barriers can be as big a roadblocks as clearly articulated disparate interests between parties.

Types of Barriers:

- Emotional (*e.g.*, negative feelings toward the sender or the receiver of a message, or how you feel about yourself)
- Physical or environmental
- Miscalculations, misunderstandings or bad information
- Inability to creatively address the problem

How to Overcome Barriers

- Recognize that there is a barrier
- Deal with the barrier honestly to eliminate or at least work around it.

III. Mediator's Role In a Facilitated Process

A. Purpose of Mediation

1. Provide an atmosphere of trust for parties and process
2. Vent feelings and reduce hostility
3. Negotiate in a respectful and productive atmosphere
4. Clear up misunderstandings between/among parties
5. Understand parties, issues, and everyone's underlying interests
6. Explore options
7. Find areas of agreement as a basis for parties' own solutions

B. Role of the Mediator

1. Ensure information is available
2. Keep confidences
3. Listen actively
4. Help identify interests and develop options
5. Reduce tension
6. Provide for caucuses and reality checks, if necessary and appropriate
7. Be impartial and non-judgmental
8. Help clarify and avoid misunderstandings
9. Instill trust in process
10. Help parties reach their own agreement

IV. Skills for Participants Who Facilitate Meetings

Negotiated processes that are not facilitated by third party neutral facilitators must be run by the participants themselves. How can a leader be the most effective?

A. **Identify the Purpose of Meeting**. What are the outcomes needed? Specify approximate time needed.

B. **Make Sure the Right People Attend**. This includes key individuals who could oppose decisions made by the group? Those persons need to participate. Do attendees have decision-making authority? Do you need experts or particular skilled persons to attend?

C. **Agenda**. Identify specific topics, whether multiple meetings are needed, and the approximate time required for each task

D. **Materials, Room, Data**. Determine what should be sent to participants in advance, any information that should be available at the meeting, whether any equipment (*e.g.* flip chart, projectors, computers, telephones) is needed, and the room size and location.

E. **Ground Rules**. Topics may include:

1. Meeting schedules
2. Requirements for participation and attendance
3. Distribution of responsibilities (***e.g.,*** note taking, contacting members, arranging facilities and materials, preparing reports)
4. Any confidentiality rules

5. How information should be shared within the group/others
6. Who talks and when; dealing with interruptions
7. Whether decisions be by consensus or voting
8. What happens if no agreement is reached

F. **Managing the Meeting**. The facilitator must ensure that all interests are heard equally and understood, control order and length of discussion, interruptions, and support and encourage participants and foster a sense of commitment to each other and the goal.

G. **Practice Interest-Based Negotiation Skills**. The facilitator must help the other participants to follow effective negotiation practices. These include the practice of:

1. Good communication skills and productive discussion by:
   a. Not taking sides
   b. Allowing enough time for participants to express views
   c. Supporting validity of all views
   d. Helping participants save face
2. Identification of interests as opposed to positions
3. Consideration of alternatives and legitimate standards; protection of relationships
4. Development of options
5. Working toward consensus on solutions

H. **Next Steps**. Need for future meetings? Reports to others?

*** ***Interest-Based Negotiation in a Nutshell*** ***

Principles

* Focus on **issues** and problems, not personalities
* Focus on **interests**, not positions
* Create **options** to satisfy both mutual and separate interests
* Evaluate options according to **standards**, not power
* Advocate good **relationships**; promote trust; respect people
* Work toward effective **communication** enhances relationships
* Both (all) parties can meet or exceed their best alternative to a negotiated agreement (a **Win-Win** Situation)
* Parties should **help each other** meet their interests
* Open discussion expands **mutual interests and options**
* **Standards** can replace power in the negotiations outcome
* Anger is defused when people **understand each others'** motivations

Steps

* Identify issues
* Identify interests
* Consider all alternatives
* Practice good communication skills
* Encourage good relationships
* Develop options
* Commit to well-reasoned, fair agreements

Notes